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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 270

EDWARD T HULSON AND WALTER A. CHRISTENSEN,

Petitioners,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, A CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ROBERT A. SPRECHER,
LEN YOUNG SMITH,
111 West Monroe Street,
Chicago 3, Illinois,

PATTERSON & FRANKS,
100 North La Salle Street,
Chicago, Illinois,
Counsel for Petitioners.

THE BUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, A CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Edward T. Hulson and Walter A. Christensen pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above case on April 24, 1961, petition for rehearing having been denied on June 2, 1961.

OPINIONS BELOW.

The opinion of the District Court (App. 15-20) is reported at 27 F. R. D. 280 (1960). The opinion of the Court of Appeals, printed in the Appendix herein, *infra*, p. 13, is reported at 289 F. 2d 726 (1961).

JURISDICTION.

The judgment of the Court of Appeals was entered on April 24, 1961 (Appendix, *infra*, p. 23). Rehearing was denied on June 2, 1961 (Appendix, *infra*, p. 25). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

1. Does Rule 60(b) give a court the jurisdiction and power to relieve a party from a judgment where a motion for a new trial and a motion for judgment notwithstanding the verdict are not made within 10 days but a motion to enlarge the ten-day period is allowed within 10 days and where counsel for the moving party, counsel for the responding party and the court itself believed in good faith that such an extension was permissible under the federal rules, particularly in view of the court's statement that he would grant a new trial if he had the jurisdiction and power to do so?

2. In the alternative, may such relief be granted by considering timely written and oral motions to extend time as motions for a new trial and judgment notwithstanding the verdict, so that the moving party is deemed to have complied with the rules?

3. Where a trial court states that justice requires a new trial, does a Court of Appeals, through Rule 60(b) or otherwise, have the jurisdiction or power to grant the new trial?

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED.

Rules 6(b), 59(b) and 60(b) of the Federal Rules of Civil Procedure are involved, all of which are reproduced in the Appendix herein, *infra*, p. 26.

STATEMENT.

This is an action for personal injuries resulting from an accident which occurred on December 22, 1957.

On June 7, 1960, the jury returned a verdict finding the defendant "Not Guilty" as to both plaintiffs and on the same day judgment was entered on the verdicts (App. 123).

On June 16, 1960, the plaintiffs served upon the defendant, and filed with the clerk of the court, a *written* motion praying that the plaintiffs be granted "a reasonable time in which *to amend their motion for a new trial* by making specific objections to specific instructions" (App. 124). An affidavit by counsel for the plaintiffs was attached to the motion in which counsel stated that he had been diligent in his efforts to secure a transcript of the instructions given to the jury and that it would be impossible to make specific objections "unless the Court sees fit to permit him *to amend his Motion for a new trial* within a reasonable time" (App. 125). This written motion for additional time *"to amend"* the motion for a new trial was served and filed within the ten-day period specified by Rule 59(b):

> "A motion for a new trial shall be served not later than 10 days after the entry of the judgment."

On June 17, 1960, the plaintiffs' attorney appeared in open court before the Honorable John F. Kilkenny, the defendant being represented by one of its attorneys, and moved the Court to act upon the written motion for extending the time for the filing of plaintiffs' amended motion for a new trial, at which time the following colloquy took place between court and counsel (App. 122-3):

> The Court: Counsel in Hulson versus Atchison, Topeka & Santa Fe, I am right in the middle of a trial here. *Your motion was filed yesterday.* I will notify you when I can hear it. Would you be available later this afternoon?

Mr. Patterson (Counsel for the plaintiffs): Yes, your Honor, *but counsel has no objection.* I am merely asking for an extension of time in which to file my motion for a New Trial.

The Court: All right, if that is all you are asking, why *the motion is granted.*

Mr. Patterson: You will extend the time for what period, your Honor?

The Court: I will extend it—When was this judgment entered?

Mr. Patterson: Ten days ago.

The Court: I see. Then *we will extend it for an additional ten days.*

Mr. Patterson: That is for the entire Motion?

The Court: That is for the filing of the Motion. Now, it is entirely possible gentlemen that *you may have to submit this on written memorandum.* I might not be here.

Mr. Patterson: I meant to inquire—under the Rules some of the Judges require we submit memoranda and briefs of authorities in support, within five days after the filing of the motion.

The Court: Well, that will be satisfactory because I probably will not be here. In any event, *you had better submit your memorandum* either with, or a short time after the filing of the motion and then, of course, you would have an opportunity to reply to that.

Mr. Svolos [Counsel for the defendant]: There is only one thing I would like to point out to the Court; *I will be gone for the next two months. I will be out on the West Coast. It would be impossible for me to argue this orally this summer.*

The Court: Well, there won't be an oral argument on it anyway because I will not be here, and I would not think you would want to come out to Oregon to argue it. (Emphasis supplied.)

It is clear from the record that counsel for the plaintiffs intended to file a short form of motion for a new trial on June 17, 1960, together with his motion "to amend" the

motion for a new trial within a reasonable extended time, but that due to the occupation of the trial judge with other matters and the acquiescence of counsel for the defendant, counsel for the plaintiff simply obtained an order extending his time for filing a motion for a new trial and for a judgment notwithstanding the verdict, and no motion for a new trial was filed on June 17, 1960.

On the same day, June 17, 1960, within the ten-day period specified by Rule 59(b) for the serving of a motion for a new trial, and within the ten-day period specified by Rule 50(b) for the making of a motion for a judgment notwithstanding the verdict, the court entered the following order (App. 125):

> "Ordered that plaintiffs' time in which to file their motion for judgment notwithstanding the verdict or, in the alternative, for a new trial be and it is hereby extended for a period of ten days, briefs of counsel to follow."

On June 27, 1960, within the period allowed by the court's order, the plaintiffs filed their motions for judgment notwithstanding the verdict or in the alternative for a new trial and, on the same day, copies thereof were served on the attorneys for the defendant (App. 7). The motion enumerated eight grounds for the entry of a judgment notwithstanding the verdict and twenty-four grounds for the granting of a new trial (App. 7-12). Filed with the motion was an affidavit by the plaintiffs' counsel stating that at no time during any pre-trial conference, or at any time prior to the opening statement by counsel for defendant, did the defendant disclose any facts tending to indicate that the defense would be predicated upon the theory of non-liability because of the acts of independent contractors (App. 13).

Four days later, on July 1, 1960, the plaintiffs filed a 38-page brief, setting forth in great detail the specific

reasons for a judgment notwithstanding the verdict and for a new trial (App. 127).

On July 8, 1960, the defendant filed affidavits (App. 127); on July 15, 1960, the defendant filed its motion to strike the plaintiffs' motion for judgment notwithstanding the verdict or for a new trial (App. 14), together with its brief in support thereof (App. 128); and on July 26, 1960, the defendant's motion to strike was taken under advisement and the plaintiffs were given 30 days to file their answering brief and the defendant was given 5 days thereafter to file its reply brief (App. 128).

On August 23, 1960, the plaintiffs filed their motion for relief under Rule 60(b) of the Federal Rules of Civil Procedure (App. 129). On the same day, the plaintiffs filed their brief in opposition to defendant's motion to strike and in support of their motion for relief under Section 60(b) (App. 133).

On August 30, 1960, the defendant filed a reply brief (App. 133) and on September 7, 1960, the district judge entered his order (which was filed on September 13, 1960) (App. 15-20).

In his order dated September 7, 1960, allowing the defendant's motion to strike the plaintiffs' motion for judgment notwithstanding the verdict or, in the alternative, for a new trial, the District Judge said (App. 20):

> "It is with a great deal of reluctance that I arrive at the conclusion that defendant's motion to strike must be allowed. *There is considerable merit in plaintiffs' motion for a new trial and if the Court had jurisdiction, I would set aside the verdict and the judgment entered thereon, and allow the plaintiffs a new trial on the ground that the verdict was against the overwhelming weight of the evidence and that it would be necessary to set aside the judgment in order to prevent a miscarriage of justice. Altrichter* v. *Shell Oil Co.*, 8 Cir., 1959, 263 F. 2d 377." (Emphasis supplied.)

The plaintiffs filed their notice of appeal on October 4, 1960 (App. 21). On April 24, 1961, the Court of Appeals dismissed the appeal in part and affirmed it in part.

REASONS FOR GRANTING THE WRIT.

1. The Court's interpretation of Rules 6(b) and 59(b) is in conflict with the decisions of the Ninth Circuit Court of Appeals in *Yanow* v. *Weyerhaeuser Steamship Company*, 274 F. 2d 274 (9th Cir., 1959), cert. denied 362 U. S. 919, and *Daulton* v. *Southern Pacific Co.*, 228 F. 103 (9th Cir., 1955), cert. denied 352 U. S. 1005.

The Ninth Circuit Court of Appeals has held that the provision of Rule 6(b) that a district court "may not extend the time for taking any action" under Rule 59(b) does not deprive district courts of jurisdiction to enter an order extending the time. *Yanow* v. *Weyerhaeuser Steamship Company*, 274 F. 2d 274 (9th Cir., 1959), cert. denied 362 U. S. 919. There, as in the *Hulson* case, an order was entered extending the time for filing a motion for new trial, and the motion was filed within the extended period. In passing on the timeliness of the motion, the court analyzed the "distinction between cases where certain facts are strictly jurisdictional in the sense that without them the act of the court is a mere nullity, and those cases in which the facts are only quasi-jurisdictional * * *." The court concluded that the time period for filing a motion for new trial is a *quasi-jurisdictional* requisite, and that tardy filing does not deprive the trial court or the Court of Appeals of power to rule upon the merits of the motion. (274 F. 2d at 279-280.)

All courts shun deciding cases upon procedural technicalities instead of the merits, and rightly so. The literal requirements of the Federal Rules have often been relaxed where circumstances justify it. For example, in *Witt* v.

Merrill, 208 F. 2d 285 (4th Cir., 1953), counsel for plaintiff made an oral motion for new trial within 10 days after judgment, but did not file the motion in writing, as required by Rule 8(b). Holding that the oral motion was sufficient compliance with the rules, the Court of Appeals for the Fourth Circuit said (208 F. 2d at 286):

> "The liberal Rules of Civil Procedure must not be transformed by judicial interpretation into technical traps for the unwary * * *. To hold that the motion for new trial was a nullity because the grounds were not stated, even though the trial judge entertained it, continued it for purposes of argument and permitted the parties to file briefs addressed to it, would be to deny review on a technicality in contravention of the spirit of the rules."

So too, in the case at bar plaintiffs have been denied review on a technicality in contravention of the spirit of the Rules.

The Court also ruled that if "the motion for new trial is untimely, the trial court has no choice but to deny the motion * * *." (Appendix, p. 19.)

In *Daulton* v. *Southern Pacific Co.*, 228 F. 2d 103 (9th Cir., 1955), cert. denied 352 U. S. 1005, the trial court ruled upon the merits of plaintiff's motion for new trial filed more than 10 days after the entry of judgment, even though no order was entered extending the time. The Court of Appeals approved this action, pointing out that plaintiff filed a motion for relief under Rule 60(b) alleging excusable neglect.

Federal district courts are not helpless to prevent an obvious injustice. The court below had power to hear and determine plaintiffs' motion for new trial.

2. The Court's holding that Rule 60(b) is inapplicable to this case conflicts with the decision of the Court of Appeals in *Sternstein* v. *"Italia"-Societa, etc.*, 275 F. 2d 502

(2d Cir., 1960), counsel for both parties and the trial judge were unaware of the provisions of Rule 6(b), and orders were entered purporting to extend the time for filing post-trial motions. In similar cases, other Courts of Appeal have refused to permit justice to be overcome by the inadvertent and harmless delay and, consistent with the salutary purposes of the Federal Rules of Procedure, have ruled upon the merits of the case.

The Court in the present case, without adverting to the unusual construction of Rule 60(b) adopted by the District Court, summarily rejected plaintiffs' petition for relief under Rule 60(b). Contrary to the Court's conclusion, we respectfully submit that "ignorance of the rules resulting in an agreement for an unauthorized extension of time" *can* be the kind of "mistake, inadvertence, surprise, or excusable neglect" referred to in Rule 60(b). Having in mind the lack of juxtaposition between Rule 6(b) and Rule 59(b), it is understandable that counsel could fail to become aware or to recall that the 10-day time period for filing motions for new trial may not be extended.

In *Sternstein* v. *"Italian"-Societa, etc.*, 275 F. 2d 502 (2d Cir., 1960), as in the case at bar, an order was entered extending the time for filing a post-trial motion, and the motion was filed within the extended period. The Second Circuit Court of Appeals held that Rule 60(b) was available to relieve the litigant and his counsel from the rigors of Rule 6(b) and 59(b) (275 F. 2d at 503):

> "* * * The trial judge believed the interests of justice required a new trial and the record discloses that there was a proper basis for such belief. Rule 60(b) was not intended to deprive a trial judge of his discretionary power to direct a new trial whenever he considered such a course necessary to defeat injustice."

See also *F. D. I. C.* v. *Alker*, 234 F. 2d 113, 116 (3rd Cir., 1956); *Daulton* v. *So. Pac. Co.*, 228 F. 2d 103 (9th Cir.,

1955), cert. denied 352 U. S. 1005; *Caraway* v. *Sain*, 23 F. R. D. 657, 659-660 (N. D. Fla., 1959).

Rule 60(b) should not be stultified by narrow construction. It provides courts with the means of securing justice in a myriad of situations. The Opinion fails to explain why it cannot be invoked to alleviate counsel from an honest, inadvertent error acquiesced in by opposing counsel and the trial court.

The chief purpose of Rule 60(b) was to prevent injustices stemming from inadvertence. If that rule does not encompass the kind of honest, understandable, harmless error which occurred here, it is difficult to imagine its proper use. The broad sweep of Rule 60(b) was recognized by the United States Supreme Court in *Klapprott* v. *U. S.*, 335 U. S. 601, 614-615 (1949), referring to subsection (6)—"any other reason justifying relief from the operation of the judgment"—

> "• • • In simple English, the language of the 'other reason' clause, for all reasons except the five particularly specified, vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice."

3. Substantive rights should not be defeated by a litigant's failure to meet a time limit, where defendant's counsel agreed to the extension of time for filing the motion for new trial, the District Judge entered an order extending the time, and no harm has befallen the defendant as a result of the delay. The drafters of the Federal Rules of Civil Procedure could not have intended this unjust result.

Whenever a procedural rule is permitted to defeat justice, the purpose of law is likewise defeated. In *Lott* v. *United States*, 81 S. Ct. 1563 (1961), this Court disposed of a case involving the 10-day period for taking an appeal under Rule 37 of the Federal Rules of Criminal Procedure without the necessity of resolving what this Court recog-

nized as "obscurity, if not inconsistency, in these Rules that has been exposed by this case." The Court's characterization of the contentions made by petitioners in that case apply here:

> "They contend that to hold their appeals to have been untimely * * * would be to mutilate the plain language of Rule 37(a)(2) and to make of it a trap even for the wary—including their experienced and competent counsel who were doing their best to protect petitioners' rights of appeal. And they insist that such a snare should not be permitted to deprive one of the valuable right of an appeal upon which his liberty, or even his life, may well depend."

The salutary policy of the Federal Rules should not be subverted in a case in which, through honest inadvertence, and without harm to the court or the litigants, a time limitation has been misapprehended. The courts are not powerless to grant relief in such cases, to the end that litigants' rights are adjudicated on the merits, and not on procedural niceties in a manner reminiscent of what passed for justice in days gone by.

4. Defendant should be held to be estopped to question the validity of the extension order, under the rule of *Whayne* v. *Glenn*, 114 F. Supp. 784 (W. D. Ky., 1953).

Defendant stood by in silence and permitted the District Court to enter the orders which it now claims were invalid. While "counsel cannot waive the strict requirements of the rules," in fairness defendant should be estopped to question the efficacy of the extension orders.

In *Whayne* v. *Glenn*, 114 F. Supp. 784 (W. D. Ky., 1953), revd. on other grounds, 222 F. 2d 549 (6th Cir., 1955) the defendant agreed to the entry of an order extending the time within which plaintiff could file his post-trial motion. The motion was filed within the extended period. Chief Judge Shelbourne rejected the defendant's conten-

tion that the motion was not timely and that the court could not rule upon it on the merits (114 F. Supp. at 785):

> "In view of the mutual agreements of counsel for both parties extending the time in which plaintiff could file his motion to revise and reconsider the findings of fact and conclusions of law, defendant should be held to have waived the provision of the rules requiring such a motion to be filed within ten days of the entry of judgment * * *."

The rule of *Whayne* v. *Glenn* should be applied in the case at bar.

CONCLUSION.

Beyond the harm done to individual litigants, the entire fabric of the law is injured when harmless procedural aberrations control the outcome of litigation. We urge this Court to bring the Seventh Circuit into accord with the enlightened approach to these problems reflected in the decisions of the Second, Fourth and Ninth Circuits discussed above.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT A. SPRECHER,
LEN YOUNG SMITH,
111 West Monroe Street,
Chicago 3, Illinois,

PATTERSON & FRANKS,
100 North La Salle Street,
Chicago, Illinois,
Counsel for Petitioners.

APPENDIX.

I. OPINION OF COURT OF APPEALS.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

September Term, 1960 — April Session, 1961.

No. 13186
EDWARD T. HULSON and WALTER A. CHRISTENSEN,
Plaintiffs-Appellants,
vs.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

April 24, 1961.

Before HASTINGS, *Chief Judge*, SCHNACKENBERG and CASTLE, *Circuit Judges*.

HASTINGS, *Chief Judge*. This is an action for damages alleged to have resulted from personal injuries sustained in an accident on December 22, 1957.

Edward T. Hulson and Walter A. Christensen (plaintiffs) were employed by the United States Post Office as postal transportation clerks. On December 22, 1957, together with other clerks, they began their work at 9:10

o'clock a.m. inside a railroad car, half of which was constructed and designed as a railway post office, while such car was standing on a track at the Kansas City, Missouri terminal. This car was moved from that location and coupled with other cars of The Atchison, Topeka and Santa Fe Railway Company (defendant) as a part of defendant's train No. 12. About noon that day while defendant was engaged in a switching operation wherein certain cars of this train were being moved, plaintiffs were injured as a result of being thrown against various parts of the inside of the car in which they were working.

Plaintiffs commenced this action by filing a complaint against defendant in the Circuit Court of Cook County, Illinois. They charged that their injuries resulted from negligent operation of the engine and cars by defendant. Defendant removed the cause to the United States District Court for the Northern District of Illinois, Eastern Division, on diversity grounds.

Defendant answered denying generally the allegations in the complaint. The cause was set for trial on the sole issue of liability. The trial was heard by a jury on June 6-7, 1960 with the Honorable John F. Kilkenny, District Judge, presiding.

On June 7, 1960, after the close of all the evidence, plaintiffs moved for a directed verdict. The motion was denied at that time.

On June 7, 1960, the jury returned a verdict finding defendant "not guilty" as to both plaintiffs. On the same day judgment was entered on the verdict against plaintiffs and favorable to defendant.

On June 16, 1960, plaintiffs served on defendant and filed with the clerk of the district court a written notice that they would appear before the trial court on June 17, 1960 and present a motion (copy of which was attached)

praying that the plaintiffs be "granted a reasonable time *to amend their motion for a new trial* by making specific objections to specific instructions." (Emphasis added.) An affidavit was attached to the motion by plaintiffs' counsel in which counsel stated that he had been diligent in his efforts to secure a transcript of the jury instructions and that it would be impossible to set out the specific instructions to which he objected and to state the objections thereto "unless the Court sees fit to permit him to amend his Motion for a new trial within a reasonable time." At that time no motion for a new trial had been filed by plaintiffs.

On June 17, 1960, counsel for all parties were present in court and plaintiffs' attorney orally moved the court for an order extending the time in which to file plaintiffs' motion for a new trial. Plaintiffs' counsel stated that defendant's counsel had no objection to the motion. At that time the following colloquy took place between the court and counsel in open court:

> "• • •
>
> "The Court: • • • Would you be available later this afternoon?
>
> "Mr. Patterson [plaintiffs' attorney]: Yes, Your Honor, but counsel has no objection. I am merely asking for an extension of time in which to file my motion for a New Trial.
>
> "The Court: All right, if that is all you are asking, why the motion is granted.
>
> "Mr. Patterson: You will extend the time for what period, your Honor?
>
> • • •
>
> "Mr. Svolos [defendant's attorney]: There is only one thing I would like to point out to the Court: I will be gone for the next two months. I will be out on the West Coast. It would be impossible for me to argue this orally this summer."

On the same day the court entered the following order:

> "On motion of plaintiffs, time to file motion for judgment notwithstanding the verdict or, in the alternative, for a new trial extended for a period of ten days, briefs to follow."

On June 27, 1960, for the first time, plaintiffs filed their motion for judgment notwithstanding the verdict, or in the alternative, for a new trial. The motion set out eight grounds for entry of a judgment n.o.v. and twenty-four grounds for granting a new trial. Attached to the motion was an affidavit by plaintiffs' counsel stating in substance that at no time prior to the introduction of evidence had defendant disclosed a theory of defense based on the acts of independent contractors. On July 1, 1960, plaintiffs filed their brief in support of their motion. On July 8, 1960, defendant filed affidavits in opposition to plaintiffs' affidavit and on July 15, 1960 filed its written brief and argument in opposition to plaintiffs' motion.

On July 15, 1960, defendant filed its written motion to strike plaintiffs' motion for judgment n.o.v., or in the alternative, for a new trial. The ground for this motion to strike was that plaintiffs' motion was not filed within the time and limits prescribed by Rule 50(b) and Rule 59(b), (d) and (e) of the Federal Rules of Civil Procedure, 28 U. S. C. A.[1] It was further stated that the trial court was prohibited from enlarging the time in which to file such motion by the provisions of Rule 6(b). Briefs were filed by both parties.

On August 23, 1960, plaintiffs filed their motion for relief under Rule 60(b). Following briefs addressed to this latter motion, on September 7, 1960, the trial court entered an order granting defendant's motion to strike plaintiffs' motion for judgment n.o.v., or in the alternative,

1. References to Rules herein are to the Federal Rules of Civil Procedure, Title 28, U. S. C. A.

for a new trial; and such motion was stricken. In a memorandum opinion filed on September 13, 1960 the trial court held that it could not grant relief to plaintiffs under Rule 60(b).

Plaintiffs filed their notice of appeal on October 4, 1960 stating that they were appealing from:

> "1. The judgment on the verdict finding the defendant not guilty, entered in this action on June 7, 1960;
>
> "2. The order denying the plaintiffs' motion for a directed verdict at the close of all of the evidence, entered in this action on June 7, 1960;
>
> "3. The order extending for a period of 10 days the time to file a motion for judgment notwithstanding the verdict, or in the alternative, for a new trial, entered in this action on June 17, 1960;
>
> "4. The order allowing the defendant's motion to strike the motion of the plaintiffs for judgment notwithstanding the verdict or in the alternative for a new trial, and striking the plaintiffs' said motion, entered in this action on September 7, 1960."

Defendant moved in this court "to dismiss paragraphs 1, 2 and 3 of the [above] notice of appeal," and we ordered the motion continued without prejudice and to be taken with the case on its merits as to the above paragraph 4.

We shall first consider defendant's motion to dismiss this appeal as to paragraphs 1, 2 and 3 in the notice of appeal.

As applied to this case, under Rule 73(a) plaintiffs were permitted to take an appeal within "30 days from the entry of the judgment appealed from." The jury verdict was received and judgment entered thereon finding defendant not guilty on June 7, 1960. The notice of appeal was filed on October 4, 1960.

Under Rule 50(b) plaintiffs were required to move for

motion for judgment n.o.v. "[w]ithin 10 days after the reception of a verdict, * * *." Plaintiffs' said motion was not filed until June 27, 1960, or 20 days thereafter.

Under Rule 59(b) "[a] motion for a new trial shall be served not later than 10 days after the entry of the judgment"; under subsection (d) the trial court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party "[n]ot later than 10 days after entry of judgment"; and under subsection (e) "[a] motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment." Judgment was entered on June 7, 1960, and plaintiffs' motion in question was not served until June 27, 1960.

Under Rule 6(b) the trial court "may not extend the time for taking any action under rules * * * 50(b), * * * 59(b), (d) and (e), 60(b), and 73(a) and (g), except to the extent and under the conditions stated in them."

Thus, it is quite clear that plaintiffs' motion for judgment n.o.v. was not made within 10 days after the reception of the verdict and is not within the limitation imposed by Rule 50(b). Under such circumstances "the rule forbids the trial judge or an appellate court to enter such a judgment." *Johnson* v. *New York, N. H. & H. R. Co.*, 344 U. S. 48, 50 (1952); *Fountain* v. *Filson*, 336 U. S. 681, 683 (1949); *Globe Liquor Co.* v. *San Roman*, 332 U. S. 571, 574 (1948); *Cone* v. *West Virginia Paper Co.*, 330 U. S. 212, 217-18 (1947); *Mickey* v. *Tremco Manufacturing Company*, 7 Cir., 226 F. 2d 956, 957 (1955).

Further, Rule 59(b), (d) and (e) prohibits a trial court from granting a motion for a new trial made after the expiration of 10 days after entry of judgment. "The trial court did not have jurisdiction to hear and pass on reasons for a new trial which were not assigned and served on the defendants within ten days after the entry of the judg-

ment." *Fine* v. *Paramount Pictures*, 7 Cir., 181 F. 2d 300, 303 (1950); *Steward* v. *Atlantic Refining Company*, 3 Cir., 235 F. 2d 570, 572 (1956). If the motion for new trial is untimely, the trial court has no choice but to deny the motion; and *the tardy motion will not toll the time for taking an appeal.* 6 Moore's Federal Practice, pp. 3851-52 (2d ed.).

The 10 day limit for filing a motion for new trial fixed in Rule 59(b) cannot be enlarged under Rule 6(b), except as provided in subsection (c) of Rule 59, and such exception has no application to the situation before us here. *Leishman* v. *Associated Electric Co.*, 318 U. S. 203, 206, note 4 (1943); *Safeway Stores* v. *Coe*, D. C. Cir., 136 F. 2d 771, 775 (1943). 6 Moore's Federal Practice, p. 3846, note 26 (2d ed.).

In order to avoid the application of the foregoing rules, plaintiffs urge this court to treat the motion for extension "to amend their motion for a new trial," served on June 16, 1960, as a motion for a new trial. The trial court did not err in rejecting this contention. Plaintiffs' motion "cannot be measured by its unexpressed intention or wants." It "should be treated as nothing but what it actually was," one to amend a motion for a new trial which was not on file and was never timely filed. *Johnson* v. *New York, N. H. & H. R. Co.*, *supra*, 344 U. S. at page 51; *John E. Smith's Sons Co.* v. *Lattimer Foundry & Mach. Co.* D. C. M. D. Penn., 19 F. R. D. 379, 381 (1956), and cases cited therein, affirmed 3 Cir., 239 F. 2d 815 (1956).

In light of the foregoing, we hold that defendant's motion to dismiss this appeal as to paragraphs 1, 2 and 3 of the notice of appeal must be sustained for lack of jurisdiction, pursuant to Rules 73(a) and 6(b).

The question raised in paragraph 4 of the notice of appeal and the denial of relief under Rule 60(b) is properly before us. This concerns the appeal from the order

of the district court entered on September 7, 1960 allowing defendant's motion to strike the motion of plaintiffs for judgment n.o.v., or in the alternative, for a new trial, and striking such motion.

Plaintiffs point to the fact that defendant's counsel agreed to the extension of time for filing their motion for judgment n.o.v., or in the alternative, for a new trial and thereby, in effect, waived plaintiffs' failure to comply with the rules. However, it is quite clear that counsel cannot waive the strict requirements of the rules. *Slater* v. *Peyser*, D. C. Cir., 200 F. 2d 360, 361 (1952); *John E. Smith's Sons Co.* v. *Lattimer Foundry & Mach. Co.*, *supra*, 19 F. R. D. at 381-82 and cases cited therein; 6 Moore's Federal Practice, p. 3847, note 28 (2d ed.).

Plaintiffs candidly admit that they were mistaken in understanding the requirements of the rules, but urge that counsel for all parties and the trial court in good faith believed at the time that granting the extension of time was proper and permissible under the rules. Ignorance of the rules resulting in an agreement for an unauthorized extension of time cannot serve to furnish grounds for relief under Rule 60(b), under the facts before us in this appeal.

Plaintiffs rely heavily on the following statement made by the district court in its memorandum opinion:

> "It is with a great deal of reluctance that I arrive at the conclusion that defendant's motion to strike must be allowed. There is considerable merit in plaintiffs' motion for a new trial and if the Court had jurisdiction, I would set aside the verdict and the judgment entered thereon, and allow the plaintiffs a new trial on the ground that the verdict was against the overwhelming weight of the evidence and that it would be necessary to set aside the judgment in order to prevent a miscarriage of justice. *Altrichter* v. *Shell Oil Co.*, 8 Cir., 1959, 263 F. 2d 377."

We can only conclude that this dictum on the part of the trial court serves to emphasize its conviction that it was powerless to grant the relief requested by plaintiffs.

We think the statement made by Judge Maris in *John E. Smith's Sons Co.* v. *Lattimer Foundry & Mach. Co.*, 3 Cir., 239 F. 2d 815, 817-18 (1956), is dispositive of the issue raised under Rule 60(b):

> "[illegible] as we have seen the defendant moved for the application of Rule 60(b), clauses (1) and (6), to its motion for a new trial. Conceding that under appropriate circumstances the district court may entertain under Rule 60(b) a motion for a new trial which is untimely under Rule 59(b) it is perfectly plain that it may do so only if a showing is made which complies with the requirements of that rule, clause (1) of which requires a showing of 'mistake, inadvertence, surprise, or excusable neglect' and clause (6) a showing of 'any other reason justifying relief from the operation of the judgment.' As we pointed out in *Federal Deposit Insurance Corp.* v. *Alker*, 3 Cir., 1956, 234 F. 2d 113, 117, Rule 60(b) provides for extraordinary relief and may only be invoked upon a showing of exceptional circumstances. Here, however, as the district court has pointed out in its opinion, the defendant's motion for the application of Rule 60(b) contained no allegations whatever which would support the granting of relief under that rule.
>
> "Since the motion for a new trial was untimely served under Rule 59(b) and no showing was made of exceptional circumstances calling for extraordinary relief under Rule 60(b) the district court did not err in striking the motion."

We hold the trial court did not err in striking plaintiffs' motion for judgment n.o.v., or in the alternative, for a new trial, and in denying plaintiffs relief under Rule 60(b).

It is ordered that this appeal be and it is hereby dismissed as to the issues raised in paragraphs 1, 2 and 3 in the notice of appeal. The order of the district court striking plaintiffs' motion for judgment notwithstanding the verdict, or in the alternative, for a new trial and the denial of relief to plaintiffs under Rule 60(b) are affirmed.

APPEAL DISMISSED IN PART AND
AFFIRMED IN PART.

2. JUDGMENT OF COURT OF APPEALS.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois

Monday, April 24, 1961.

Before

Hon. John S. Hastings, Chief Judge
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Latham Castle, Circuit Judge

EDWARD T. HULSON and WALTER A. CHRISTENSEN,
Plaintiffs-Appellants,
vs.
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation,
Defendant-Appellee.

No. 13186

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division and on motion to dismiss appeal, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that this appeal be, and it is hereby DISMISSED as to the issues raised in paragraphs 1, 2 and 3 in the notice of appeal, which paragraphs state that plaintiffs-appellants are appealing from:

"1. The judgment on the verdict finding the defendant not guilty, entered in this action on June 7, 1960;

"2. The order denying the plaintiffs' motion for a directed verdict at the close of all of the evidence, entered in this action on June 7, 1960;

"3. The order extending for a period of 10 days the time to file a motion for judgment notwithstanding the verdict, or in the alternative, for a new trial, entered in this action on June 17, 1960."

It is further ordered and adjudged by this Court that the order of the District Court entered therein on September 7, 1960, striking plaintiffs' motion for judgment notwithstanding the verdict, or in the alternative, for a new trial and the denial of relief to plaintiffs under Rule 60(b) be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this day.

3. ORDER DENYING REHEARING.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois

Friday, June 2, 1961.

Before

Hon. John S. Hastings, Chief Judge
Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Latham Castle, Circuit Judge

EDWARD T. HULSON and WALTER A. CHRISTENSEN,
Plaintiffs-Appellants,
No. 13186 *vs.*
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS ORDERED by the Court that the petition for a rehearing filed by appellants in the above entitled cause, be, and the same is hereby, DENIED.

4. FEDERAL RULES OF CIVIL PROCEDURE CITED AND QUOTED.

Rule 6.

(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under rules 25, 50(b), 52(b), 59(b), (d) and (e), 60(b), and 73(a) and (g), except to the extent and under the conditions stated in them. As amended Dec. 27, 1946, eff. March 19, 1948.

Rule 59.

(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of the judgment. As amended Dec. 27, 1946, eff. March 19, 1948.

(c) Time for Serving Affidavits. When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment. Added Dec. 27, 1946, eff. March 19, 1948.

RULE 60.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant

relief to a defendant not actually personally notified as provided in Title 28, U. S. C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. As amended Dec. 27, 1946; Dec. 29, 1948, eff. Oct. 20, 1949.

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IN THE

Supreme Court of the United States

OCTOBER TERM. 1961.

No. 270

EDWARD T. HULSON AND WALTER A. CHRISTENSEN,

Petitioners,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, A CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

FLOYD J. STUPPI,
80 East Jackson Boulevard,
Chicago 4, Illinois,
Attorney for Respondent.

WILLIAM J. O'BRIEN,
GUS SVOLOS,
80 East Jackson Boulevard,
Chicago 4, Illinois,
Of Counsel.

THE GUTHRIDGE-HARDEN PRINTING COMPANY, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 270.

EDWARD T. HULSON AND WALTER A. CHRISTENSEN,

Petitioners,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, A CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

QUESTIONS PRESENTED.

---

1. Where the Seventh Circuit Court of Appeals decided in accord with the decisions of other circuits and in compliance with decisions of this Court that the time limitations of certain Federal Procedural Rules are jurisdictional and cannot be enlarged should certiorari be granted?

2. Where it is admitted that no timely post-trial motions were made pursuant to the provisions of the Federal Rules, and that consequently the Appeal was not perfected in time pursuant to those Rules, should this Court grant

certiorari for the purpose of entertaining a plea to change matters of record so that the moving party be deemed to have complied with jurisdictional requirements?

3. Should certiorari be granted to review the decision of the Court of Appeals that "ignorance of the rules resulting in an agreement for an unauthorized extension of time cannot serve to furnish ground for relief under Rule 60(b), under the facts before us in this appeal"?

4. Should this Court grant certiorari to review a policy issue inherent in the Federal Rules of Civil Procedure or leave such a determination to the rule-making process.

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED.

As indicated in petitioners' brief, p. 2, Rules 6(b), 59(b) and 60(b) of the Federal Rules of Civil Procedure are involved. In addition, however, respondent submits that Rules 50(b), 59(d), (e) and 73 (a) are also involved and are reproduced in the Appendix herein, *infra*, p. .....

STATEMENT.

The facts as stated in Petitioners' brief are not controverted by us, except for one important factor: no motion for a new trial or judgment notwithstanding the verdict was filed within the ten-day period following the entry of judgment. Petitioners, plaintiffs below, did seek permission to amend their motion for a new trial on June 17, 1960, but at that time they had filed no motion, hence there was nothing to amend. The colloquy set out on pages 3 and 4 of petitioners' brief (Appellants' App., pp. 122, 123) shows that Mr. Patterson, the plaintiffs' attorney, stated: "I am merely asking for an extension of time in which to file a motion for a new trial." Furthermore, there is no doubt that the plaintiffs' motion was so understood by the Trial

Court, for the order entered on June 17, 1960, read as follows (Appellants' App. 125):

> "Ordered that plaintiffs' time in which to file their motion for judgment not withstanding the verdict, or, in the alternative for a new trial be and is hereby extended for a period of ten days, briefs of counsel to follow."

The opinion of the Trial Court also discloses that there was no ambiguity as to the nature of plaintiffs' motion. The Court stated (Appellants' App. 18):

> "Here the record affirmatively shows that no such motion was made, either orally or in writing. This record affirmatively shows that the Court attempted to grant the plaintiffs an extension of time in which *to make such motions*. The mere motion of an extension of time in which to make the motion excludes any thought of a proper motion being made within the ten-day period." [Emphasis by the court.]

The Petitioners also contend on pages 4 and 5 of their brief that they were discouraged from filing their post-trial motions on June 17, 1960, because of the Court's preoccupation with other matters. Here again, the colloquy contained on pages 3 and 4 of their brief (Appellants' App. 122, 123) shows that the trial judge stated he would be available to hear the motion that same afternoon. Mr. Patterson, plaintiffs' attorney, responded that he was "merely asking for an extension of time to file my motion for a new trial." This exchange demonstrates that counsel for plaintiffs never intended to and did not file his motion within ten days of the entry of judgment.

The post-trial motions were not filed until June 27, 1960, twenty days after judgment was entered on the verdict. (Appellants' App., p. 7.) These motions were stricken for being untimely, on September 7, 1960, pursuant to

Federal Rules of Civil Procedure 50(b), 59(b) and 60(b) (Appellants' App. 15-20.)

Plaintiffs filed their Notice of Appeal on October 4, 1960, almost four months after judgment was entered on the verdict (Appellants' App. 21), stating that they were appealing from:

> "1. The judgment on the verdict finding the defendant not guilty, entered in this action on June 7, 1960;
>
> 2. The order denying the plaintiffs' motion for a directed verdict at the close of all of the evidence, entered in this action on June 7, 1960;
>
> 3. The order extending for a period of ten days the time to file a motion for judgment notwithstanding the verdict, or in the alternative, for a new trial, entered in this action on June 17, 1960;
>
> 4. The order allowing the defendant's motion to strike the motion of the plaintiffs for judgment notwithstanding the verdict or in the alternative for a new trial, and striking the plaintiffs' said motion, entered in this action on September 7, 1960."

Our motion to dismiss paragraphs 1, 2, and 3 of the Notice of Appeal was continued without prejudice, to be taken with the case on the merits of paragraph 4 by order of the Court of Appeals, dated November 29, 1960.

On April 24, 1961, the Court of Appeals pursuant to Federal Rules of Civil Procedure 50(b), 59(b), 73(a) and 6(b) dismissed the appeal as to the issues raised in paragraphs 1, 2, and 3 of the Notice of Appeal for lack of jurisdiction, and affirmed the order of the Trial Court complained of in paragraph 4.

REASONS FOR DENYING THE WRIT.

1. Plaintiffs' post-trial motion filed twenty days after the entry of judgment was stricken by the Trial Court pursuant to the time limitations of Rules 50(b) and 59(b) and the prohibition against their extension contained in Rule 6(b). As indicated in our Statement of Facts, plaintiffs' post-trial motion was not filed within the mandatory ten-day period of these rules. The motion of plaintiffs, twenty days after the entry of judgment, was therefore a nullity and properly stricken from the record. Rule 73(a) states that the "running of time for appeal is terminated by a timely motion." The courts have consistently held that a motion which is not timely will not serve to terminate the time for appeal.

> *F. T. C.* v. *Minneapolis-Honeywell Regulator Co.*, 344 U. S. 206, 211 (1952).
>
> *Fine* v. *Paramount Pictures*, 181 F. (2d) 300 (7th Cir., 1950).
>
> *Raughley* v. *Penn. R. R. Co.*, 230 F. (2d) 387 (3rd Cir., 1956).
>
> *Steward* v. *Atlantic Refining Co.*, 235 F. (2d) 570 (3rd Cir., 1956).

The Court of Appeals accordingly held that Rule 6(b) prohibited any enlargement of the time limitations prescribed in Rules 50(b), 59(b) and 73(a). (Petitioner's App., pp. 17-19.) A basic principle of Federal Civil Procedure was thereby correctly decided in compliance with decisions of this Court. *Johnson* v. *New York, N. H. & H. R. Co.*, 344 U. S. 48 (1952); *F. T. C.* v. *Minneapolis-Honeywell Regulator Co.*, *supra*, and *United States* v. *Robinson*, 361 U. S. 220, 229 (1960). In *Johnson*, *supra*, a verdict was returned for the plaintiff and judgment was entered. Within ten days after reception of the verdict,

defendant moved to have it set aside, but did not move for judgment notwithstanding the verdict. The trial court denied plaintiff's motion to set aside the verdict, and also denied the pre-verdict motion for dismissal and for a directed verdict. On appeal, the Court of Appeals held that the motion for a directed verdict should have been granted and reversed the judgment of the District Court. 194 F. (2d) 194. The Supreme Court of the United States held that under Rule 50(b) of the Federal Rules of Civil Procedure, the Court of Appeals could not direct entry of a judgment for defendants notwithstanding the verdict, stating at page 50:

> "On several recent occasions we have considered Rule 50(b). We have said that in the absence of a motion for judgment notwithstanding the verdict made in the trial court within ten days after reception of a verdict the rule forbids the trial judge or an appellate court to enter such a judgment. *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U. S. 212. We repeated that construction of the rule in *Globe Liquor Co.* v. *San Roman*, 332 U. S. 571, and re-emphasized it in *Fountain* v. *Filson*, 336 U. S. 681."

In *F. T. C.* v. *Minneapolis Honeywell Regulator Co.*, *supra*, this Court commented on the policy consideration dictating a strict enforcement of the time limitations on review at page 213:

> "Thus, while we do not mean to encourage applications for piecemeal review by today's decision, we do mean t encourage applicants to this Court to take heed of another principle—the principle that litigation must at some definite point be brought to an end. It is a principle reflected in the statutes which limit our appellate jurisdiction to those cases where review is sought within a prescribed period. Those statutes are not to be applied so as to permit a tolling of their time limitations because some event occurred in the lower court after judgment was rendered which is of no import to the matters to be dealt with on review."

United States v. *Robinson*, *supra*, dealt with the appeal periods prescribed by Rules 37(a) (2) and 45(b) of Federal Criminal Procedure. Rule 37(a) (2) provides a ten-day period for filing a notice of appeal following a judgment in a criminal case. Rule 45(b) is similar to Civil Procedure Rule 6(b) in that it prohibits the enlargement of the time limitations on post trial motions and the appeal period. This Court held that by virtue of Rule 45(b) the ten-day appeal period of Rule 37(a) (2) could not be enlarged. In *Robinson*, as in the instant case, "excusable neglect" was urged as a ground for relaxing the provisions of these Rules. This Court rejected this ground as a basis for circumventing the Rules and drew a direct analogy to Civil Procedure Rule 6(b) at pages 228 and 229:

> "But there is more. The prototype for Rule 45(b) was Rule 6 of the Federal Rules of Civil Procedure. When the original Criminal Rules were being prepared, the limiting clause of Rule 6(b) of the Federal Rules of Civil Procedure stated: '* * * but it may not enlarge the period for taking any action under Rule 59, except as stated in subdivision (c) thereof, or the period for taking an appeal as provided by law.' It has consistently been held that Civil Rule 6(b) was mandatory and jurisdictional and could not be extended regardless of excuse. It must be presumed that the Advisory Committee and the Justices of this Court were aware of the limiting language of Civil Rule 6(b) and of the judicial construction it had received when they prepared and adopted the Federal Rules of Criminal Procedure. No support for the conclusion of the Court of Appeals can be found in this history of Rule 45(b)."

This Court then concluded by noting that the jurisdictional nature of these Rules should not be altered by judicial decision. It stated at pages 229 and 230:

> "That powerful policy arguments may be made both for and against greater flexibility with respect to the

time for the taking of an appeal is indeed evident. But that policy question, involving, as it does, many weighty and conflicting considerations, must be resolved through the rule-making process and not by judicial decision. *United States* v. *Isthmian S. S. Co.*, 359 U. S. 314. If, by that process, the courts are ever given power to extend the time for the filing of a notice of appeal upon a finding of excusable neglect, it seems reasonable to think that some definite limitation upon the time within which they might do so would be prescribed; for otherwise, as under the decision of the court below, many appeals might—almost surely would—be indefinitely delayed. Certainly that possibility would unnecessarily produce intolerable uncertainty and confusion. Whatever may be the proper resolution of the policy question involved, it was beyond the power of the Court of Appeals to resolve it."

The Circuit Courts of Appeal have followed the decisions of this Court in holding that the time limitation for post-trial motions and the appeal period are jurisdictional in nature and cannot be extended. *Fine* v. *Paramount Pictures*, 181 F. (2d) 300 (7th Cir., 1950); *Waddell* v. *Chicago Land Clearance Comm.*, 206 F. (2d) 748 (7th Cir., 1953); *Raughley* v. *Penn R. R. Co.*, 230 F. (2d) 387 (3rd Cir., 1956); *Brest* v. *Philadelphia Transp. Co.*, 273 F. (2d) 22 (3rd Cir., 1959); *Knowles* v. *U. S.*, 260 F. (2d) 852 (5th Cir., 1958); *Steward* v. *Atlantic Refining Co.*, 235 F. (2d) 570 (3rd Cir., 1956); *Virginia Land Company* v. *Miami Ship Corp.*, 201 F. (2d) 506 (5th Cir., 1953); *Randolph* v. *Randolph*, 198 F. (2d) 956 (D. C., Cir., 1952); *Deena Produce Co.* v. *United Brick and Clay Workers*, 195 F. (2d) 612 (6th Cir., 1952), cert denied, 344 U. S. 822; *Jusino* v. *Morales and Tio*, 139 F. (2d) 946 (1st Cir., 1944).

As indicated above, this Court has denied certiorari in *Deena Produce Co.* v. *United Brick and Clay Workers*, *supra*, which involved the same procedural issues.

We submit that the preceding authorities demonstrate

that this Court has on numerous occasions clearly decided the issues involved in this petition. The decision of the Court of Appeals in this case complied with those decisions. In addition, decisions from Courts of Appeals of other Circuits are in accord. Under these circumstances this Court should deny the writ of certiorari.

The cases cited by petitioners do not support their assertion that a conflict exists between the Circuits.

In *Yanow* v. *Weyerhaeuser Steamship Company*, 274 F. (2d) 274 (9th Cir., 1959), cert. den. 322 U. S. 919, the jurisdictional question was never raised until the Court of Appeals had entertained the case on the merits and this Court had denied certiorari. The jurisdictional question was then raised in the Court of Appeals for the first time, eleven months after that Court had heard and decided the case on the merits. The Court then refused to reconsider the question of jurisdiction which it held had become *res judicata*, even if it were decided incorrectly. The Court stated at p. 277:

> "Since the question of this court's jurisdiction of the appeal was thus an issue in the case, the reversal of the judgment below was a tacit determination of the court's jurisdiction and a final adjudication of that issue. If this final adjudication was erroneous, it was subject to correction upon review in a higher court, or upon rehearing in this court. But such a judgment, whether erroneous or not, becomes *res judicata*. *Stoll* v. *Gottlieb*, *supra*."

The case is, therefore, easily distinguishable. Respondent, herein, raised the jurisdictional issue with the Court of Appeals at the earliest opportunity by motion to dismiss. (Petitioners' App., p. 17.)

In *Daulton* v. *Southern Pacific Co.*, 228 F. (2d) 103 (9th Cir., 1955), cert. denied, 352 U. S. 1005, the Appellate Court did not indicate whether it approved of the Trial Court's

action in granting relief under Rule 60(b). This was clearly stated in Judge Pope's concurring opinion at p. 103:

> "I concur in the foregoing and in doing so note that whether it was proper to grant relief under Rule 60(b) is immaterial here;—what is material is that the trial court did so."

Witt v. *Merrill*, 208 F. (2d) 285 (4th Cir., 1953), is inapplicable. In that case a motion for a new trial was made immediately after the verdict was returned.

2. The Courts below properly refused to apply Rule 60(b) under the facts of this case.

As has been noted, Rule 6(b) provides that a court may not extend the time for taking any action under Rules 50(b), 59(b), (d) and (e), "except to the extent and under the conditions stated in them." These rules contain no conditions for their extension and for this reason their time provisions have been held to be jurisdictional.

Rule 60(b) makes express reference to Rule 59(b) in subparagraph (2) and provides for relief from a final judgment where there has been "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial." No reference is made anywhere in Rule 60(b) to Rule 50(b). The fact that express reference is made to Rule 59(b) indicates that Rule 60(b) was not intended to apply to extend the time limitations of Rule 50(b) or 59(b) except under the very narrow circumstances outlined in 60(b) (2) dealing with newly found evidence. If all of the sub-sections of 60(b) had been intended to supplement the post-trial motion procedure of Rules 50(b) and 59(b), there would have been no purpose in specifying a single ground, newly found evidence, for relief from a judgment after the ten-day period has elapsed.

The only ground relied on by counsel for petitioners to invoke Rule 60(b) in their motion before the Trial Court

was that through "inadvertence and mistake" they overlooked the provisions of Rule 6(b). (Appellants' App. 132.)

It is apparent that if petitioners prevail on this theory, the provisions of 6(b) would be emasculated. Obviously, every litigant who failed to comply with the provisions of these rules could then circumvent them by the naked assertion that he was unaware of or overlooked them. The policy which favors finality to judgments and some definite point of time denoting an end to litigation would be defeated. Furthermore, rules like 73(a) and (g) dealing with time to file notice of appeal and time in which to perfect an appeal would also be affected. These rules have also been held to be jurisdictional. If "unawareness" is permitted as a ground for evading them, they would be rendered totally ineffective.

Indeed one can assume that the limitations of 6(b) on extending the time for Rules 50(b) and 59(b) were intended to apply primarily where counsel was unaware of them. Obviously, a litigant desiring a new trial would not wait beyond the ten-day period if he knew that it was jurisdictional. The fact that he does not know that it is jurisdictional, however, does not alter the nature of the time limitations imposed.

It is significant that an analysis of the cases cited by appellants reveals that they are not in point, and in some instances hold directly contrary to the proposition for which they are cited.

In *F. D. I. C.* v. *Alker*, 234 F. (2d) 113, 116 (3rd Cir., 1956), a motion was made under Rule 60(b) on the ground of newly discovered evidence. The Court refused to consider the motion or the nature of the new evidence. Here, our opponents made no contention that they based their motion under Rule 60(b) on "new evidence".

In *Sternstein* v. *"Italia"-Societa*, 275 F. (2d) 503 (2nd Cir., 1960), a motion for a new trial was made within ten days of the Court's findings of fact in a bench trial.

In *John E. Smith & Sons Co.* v. *Lattimer Foundry*, 239 F. (2d) 815 (3rd Cir., 1955), the opinion of the trial court contains a comprehensive analysis of Rule 60(b), 19 F. R. D. 379 (M. D. Pa., 1956). A motion for a new trial which had been filed but not served within ten days was stricken pursuant to Rule 59(b). The court stated at 19 F. R. D. 381:

> "The provision of Rule 59(b) requiring that a motion for a new trial be served not later than ten days after entry of judgment is mandatory. Cf. *Greenwood* v. *Greenwood*, 3 Cir., 1955, 224 F. 2d 318, 319. Rule 6(b) prohibits any enlargement of the time. Cf. *Leishman* v. *Associated Wholesale Electric Co.*, 1942, 318 U. S. 203, at page 206, 63 S. Ct. 543, 87 L. Ed. 714; *Safeway Stores, Inc.* v. *Coe*, 1943, 78 U. S. App. D. C. 19, 136 F. 2d 771, at page 775, 148 A. L. R. 782, 'We think that the purpose of Rule 6(b), which forbids the court to enlarge the time for taking any action under Rule 59 was to divest the court of jurisdiction to entertain a motion * * * filed out of time.' *Raughley* v. *Pennsylvania R. Co.*, 3 Cir., 1956, 230 F. 2d 387, at page 390, '* * * 6(b) renders a court powerless to entertain such motions when untimely made' and where the court acts contrary to such a mandate its action 'must * * * be considered as a nullity.' Id. Merely filing is not enough, cf. *Steward* v. *Atlantic Refining Co.*, 3 Cir., 235 F. 2d 570."

There the defendant, however, moved for relief under Rule 60(b) and the court in treating this motion stated at pages 383 and 384:

> "Since there are no allegations in the motion or petition seeking relief under Rule 60(b), see and cf. note 5, *supra*, we can only assume that defendant's counsel rely upon mistake, inadvertence, or excusable neglect. * * *

"Vol. 10, Cyc. of Federal Procedure, Ch. 37, sec. 37.01, p. 292, states, 'No one has ever fathomed the exact significance of the phrasing. 'Mistake' is rarely an excuse in the law and is generally frowned upon; 'surprise' is scarcely ground for a continuance, unless well justified; 'inadvertence' means unpreparedness, which is certainly no excuse in earlier stages of a lawsuit; and 'excusable neglect' is a self-nullifying term, because that which is adequately excusable is not neglect.'

"Mr. Justice Frankfurter in *Klapprott* v. *United States*, *supra*, 335 U. S. at page 630, 69 S. Ct. at pages 397, 398, suggests that 'neglect' in the context carries the idea of negligence and not merely non-action.

"Ordinarily to obtain relief one must be free from negligence. *Simonds* v. *Norwich Union Indemnity Co.*, 8 Cir., 1934, 73 F. 2d 412, at page 415; *Continental National Bank* v. *Holland Banking Co.*, 8 Cir., 1933, 66 F. 2d 823, at page 829; *Knox County* v. *Harshman*, 1890, 133 U. S. 152, at page 154, 10 S. Ct. 257, 33 L. Ed. 586, 'Relief is denied from error resulting from gross carelessness.' 7 Moore op. cit. *supra*, p. 233, citing *Greenspahn* v. *Joseph E. Seagram & Sons Inc.*, 2 Cir., 1951, 186 F. 2d 616, at p. 619, 'gross carelessness'; 5 Williston on Contracts, Rev. Ed., sec. 1427, p. 3997; *Fischer* v. *Dover Steamship Co., Inc.*, 2 Cir., 1955, 218 F. 2d 682, 683.

"Mr. Justice Minton in *Ackermann* v. *United States*, *supra*, 340 U. S. at page 198, 71 S. Ct. at page 211, speaking for the court states that there 'must be an end to litigation some day, and free, calculated, deliberate choices are not to be relieved from.' See *Kahle* v. *Amtorg Trading Corp.*, D. C. N. J., 13 F. R. D. 107; *In re Riedner*, D. C. E. D. Wis., 94 F. Supp. 289; *Ledwith* v. *Storkan*, D. C. D. Neb., 2 F. R. D. 539; *Baron* v. *Leo Feist, Inc.*, 2 Cir., 1949, 173 F. 2d 288, 290. See and cf. cases, *supra*, note 8 and see 7 Moore, op. cit. *supra*, sec. 60.10(7), pp. 17 to 21, discussing possible relief under the California decisions, '* * * defaults would not be set aside where dates for filing pleadings were confused by counsel.' pp. 19-20.

"* * * If relief were afforded in the present case, it would render the prohibition of Rule *(b) meaningless. A party is not relieved from the duty to take legal steps to protect his interests. 3 Barron and Holtzoff, Federal Practice and Procedure, Pocket Part, sec. 1329. 'Litigants and their counsel may not properly be allowed to disregard process or procedural rules with impunity.' 7 Moore, op. cit. *supra*, p. 224.

"In view of the foregoing, we were in error in not granting plaintiff's motion to strike the motion for a new trial."

We submit that this case correctly disposes of petitioners' argument for the application of Rule 60(b).

3. Petitioners urge the court to treat their motion to extend the time for filing their post-trial motion as a motion for judgment notwithstanding the verdict, or in the alternative, for a new trial. Petitioners have in effect asked this Court to change matters of record. It is admitted that no motions to alter the judgment in any way were made within the ten day period.

A similar request was made in *Johnson* v. *New York, N. H. & H. R. Co.*, 344 U. S. 48 (1952), where a verdict was returned for the plaintiff and judgment was entered. Within ten days after reception of the verdict, defendant moved to have it set aside, but did not move for judgment notwithstanding the verdict. The trial court denied plaintiff's motion to set aside the verdict, and also denied the preverdict motion for dismissal and for a directed verdict. On appeal, the Court of Appeals held that the motion for a directed verdict should have been granted and reversed the judgment of the District Court. 194 F. (2d) 194. The Supreme Court of the United States held that under Rule 50(b) of the Federal Rules of Civil Procedure, the Court of Appeals could not direct entry of a judgment for defendants notwithstanding the verdict, stating at page 50:

"Although this respondent made several motions it

> did not as the rule requires move within ten days after verdict 'to have judgment entered in accordance with his [its] motion for a directed verdict.' We are told, however, in respondent's brief that its motion to set aside the verdict 'was intended to be a motion for judgment in its favor or for a new trial' and that '[o]bviously respondent did not merely want the verdict to be set aside but wanted the relief that invariably follows such a setting aside on the grounds urged: a judgment in its favor or a new trial.' *The defect in this argument is that respondent's motions cannot be measured by its unexpressed intention or wants.* Neither the trial judge nor the Court of Appeals appears to have treated the motion to set aside the verdict as asking for anything but that. And surely petitioner is not to have her opportunity to remedy any shortcomings in her case jeopardized by a failure to fathom the unspoken hopes of respondent's counsel. *Respondent's motion should be treated as nothing but what it actually was, one to set aside the verdict—not one to enter judgment notwithstanding the verdict.*" [Emphasis supplied.]

Thus, as indicated by this Court, plaintiffs' motion in this case should be treated as nothing more than what it actually and admittedly was, one for an extension of time to file its post-trial motions. Plaintiffs' motion to "amend" their motion for a new trial filed on June 16, 1960, was meaningless since at that time there was no motion on file and hence nothing to amend. This paper did not purport to be a motion for any kind of relief from the judgment of June 7, 1960; a fact in itself fatal to the contention of the plaintiffs.

It cannot be treated as a motion for a new trial for an additional reason which is basic to Federal Procedure. It did not specify any grounds for relief. In *Fine* v. *Paramount Pictures*, 181 F. (2d) 300, 303 (7th Cir., 1950), this court stated in determining the effect of an oral motion

for a new trial made within the ten-day period but which did not specify grounds:

> "Rule 7(b), on the general requirements as to motions, does make provision for oral motions 'made during a hearing or trial.' Even if we could say that this general provision now authorizes an oral motion for a new trial (although Rule 59 seems to clearly require a written motion) and even if we could say that an oral motion made at the conclusion of the entry of the judgment was 'during the trial,' we would still be required to hold that the plaintiff's motion for a new trial in this case was insufficient.
>
> This is true because the record fails to show any reasons which were assigned for the motion within ten days after the entry of the judgment. If reasons for the oral motion were first assigned and made known to the court and the defendants on December 9, when the motion was argued and denied, they came too late to toll the time for taking an appeal. The trial court did not have jurisdiction to hear and pass on reasons for a new trial which were not assigned and served on the defendant within ten days after the entry of the judgment."

4. The petitioners do not deny that we acted in good faith in acquiescing to the Court's order in extending the time for the filing of the post-trial motions. (Petitioners' brief, p. 2.) An argument on this point, however, is moot since the courts have held that even where there is an express stipulation of counsel, the trial court cannot extend the jurisdictional periods of the Rules involved in this case.

In *Orange Theatre Corp.* v. *Rayherstz Amusement Corp.*, 130 F. (2d) 185, 187 (3rd Cir., 1942), the court in discussing the power of counsel to extend by stipulation the time provisions of the federal rules, stated:

> "However, in addition to implications and technical rules of construction, there exists a sound policy for denying litigants the privilege of enlarging time

for pleading by mere stipulation. The guiding mandate of the Federal Rules is that 'They shall be construed to secure the just, speedy, and inexpensive determination of every action.' As previously noted, the express provisions in the Rules allowing stipulations aim at this goal. But, if the practice followed by the parties in this case were permitted, the purpose of the Rules would be departed from. Litigants could, as they have done in the past, materially prolong the time for the trial of a case to suit their convenience and interests. The courtesies extended by counsel in such instances, although commendable as professional comity cannot be permitted to interfere with what we think the Rules require."

This case was cited with approval by Moore in his treatise on *Federal Practice* (2nd Ed. 1954), who stated at ¶ 59.09[1], page 3847, footnote 28:

"Rule 6(b) clearly prohibits court enlargement of the time period in the interest of judgment finality and in preventing an undue extension of the time for appeal. ¶¶6.01[5], [6], 6.07, *supra*. It is not justifiable to allow the parties, without any court supervision, to thwart that policy, when they cannot, even with court leave, do so. And, except as provided in Rule 59(c), see P. 59.10, *infra*, the parties may not extend the time to perform acts under the Rules by a mere stipulation. *Orange Theatre Corp.* v. *Rayherstz Amusement Corp.* (C. C. A. 3rd, 1942), 130 F. (2d) 185, 6 F. R. Serv. 6b.12, Case 1 (see ¶ 6.08, *supra*)."

In *Slater* v. *Peyser*, 200 F. (2d) 360 (D. C. Cir., 1952), the court stated at page 361:

"Counsel's stipulation of December 18 was not intended to extend the 10-day time limit fixed by Rule 59(b) for filing a motion for rehearing or for a new trial. Moreover, it could not do so. 'An agreement with opposing counsel * * * is not an acceptable reason for failure to comply with the rules of court or, specifically, for failure to move in proper time for exten-

sions of time as provided in such rules.' *Citizens' Protective League, Inc.* v. *Clark*, 85 U. S. App. D. C., 283, 284, 178 F. (2d) 703, 704."

Other decisions to the same effect are:

John E. Smith's Sons Co. v. *Lattimer Foundry and Mach. Co.*, 19 F. R. D. 379 (D. C. Pa., 1956). Aff'd 239 F. (2d) 815 (3rd Cir., 1956).

United States v. *Mayer*, 235 U. S. 55 (1914).

An analogy may also be drawn to the time period within which an appeal may be taken. It is uniformly held that such period is jurisdictional and may not be extended or waived by the parties. *Martin* v. *Hess*, 146 F. (2d) 360 (6th Cir., 1949).

CONCLUSION.

Certiorari should be denied because the decision of the Court below followed decisions of this Court in enforcing basic provisions of the Federal Rules of Civil Procedure. The essence of petitioner's complaint is that he did not follow the Rules because he did not read them. Compelling policy considerations of federal procedure demanding a fixed point of time denoting an end to litigation necessarily prevailed in this situation. Certiorari should not be granted to review the policy issue drafted into these Rules but should be left to the rule-making process.

Respectfully submitted,

FLOYD STUPPI,
Attorney for Respondent.

WILLIAM J. O'BRIEN,
GUS SVOLOS,
Of Counsel.

APPENDIX.

FEDERAL RULES OF CIVIL PROCEDURE CITED.

Rule 50.

(b) Reservation of Decision on Motion. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

Rule 59.

(d) On Initiative of Court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Rule 73.

(a) When and How Taken. When an appeal is permitted by law from a district court to a court of appeals the time within which an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, except that in any action in which the United States or an officer or agency thereof is a party the time as to all parties shall be 60 days from such entry, and except that upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed: The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: granting or denying a motion for judgment under Rule 50(b); or granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; or denying a motion for a new trial under Rule 59.